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No. 06-1681

IN THE

Supreme Court of the United States

HYNIX SEMICONDUCTOR, INC. AND HYNIX SEMICONDUCTOR AMERICA, INC.,

Petitioners,

v.

RAMBUS INC.,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONERS

One of the central purposes of the Federal Arbitration Act ("FAA") is to ensure that arbitration agreements are uniformly enforced regardless of the forum in which enforcement is sought. *See Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995). As a direct result of the broad division of authority described in the Petition, however, materially identical arbitration and choice-of-law provisions are being subjected to radically different interpretations depending on where they are litigated. In the decision below, for example, the California Court of Appeal interpreted a generic California choice-of-law clause to require application of California procedures, and then used those procedures to refuse to enforce a binding arbitration clause that unequivocally provided that "[a]ll" disputes under the contract were to be arbitrated. App. 5a. If the same provisions had been litigated in numerous other jurisdictions around the country, there is little doubt that the court would have reached the opposite conclusion and enforced the agreement to arbitrate. *See* Pet. 8-12. Indeed, this would have been the likely result if Respondent had brought its lawsuit in *federal* rather than state court in California. *See* Pet. 5, 9-10; note 1 *infra*.

This division of authority and the uncertainty it creates affect *every* contract that includes both an arbitration clause and a generic choice-of-law clause—which is to say, most contracts involving international commerce, and many domestic contracts as well. In its Opposition, Respondent never disputes the importance of the question presented. Instead, it argues that this Court should not and cannot address this important issue.

Respondent is wrong. First, despite Respondent's assertions, there is no serious dispute that this conflict of authority exists. *See, e.g., Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001); *Security Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 323 (2d Cir. 2004). Respondent

suggests that the conflicting decisions in the state and federal circuit courts can be reconciled based on differences in the contractual and state law provisions at issue. But as the Petition itself demonstrated, the cases cannot be so reconciled, because the provisions at issue are in all relevant respects identical.

Unable to credibly deny this conflict of authority, Respondent falls back on arguments challenging the presence of a properly-raised federal question in this case. But these arguments too lack merit: interpretation of arbitration agreements under state contract law can implicate the FAA directly, and this Court routinely reviews the decisions of state courts applying state law for conformity with that federal law. And as the Court of Appeal expressly noted, the applicability of the FAA—including the FAA's pro-arbitration interpretive presumption—was raised in the proceedings below. Respondent also argues that the decision below is consistent with both *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989), and *Mastrobuono v. Shearson Leahman Hutton, Inc.*, 514 U.S. 52 (1995). However, that is at root a merits argument that is irrelevant to whether this Court should grant review. It is also incorrect. Certiorari should be granted.

ARGUMENT

A. There Is An Entrenched Conflict Of Authority Over Whether A Generic Choice-of-Law Clause Incorporates State Rules That Limit Or Prevent Arbitration

As the Petition explains, the federal circuit and state courts are directly and broadly divided over the FAA's effect on generic choice-of-law clauses that select the law of states whose rules limit or prevent arbitration. *See* Pet. 8-16. Seven circuits and at least five states have held that, in light of the FAA's pro-arbitration policies, such clauses determine only the substantive law that governs interpretation of the

contracts in which they appear. *See* Pet. 8-12. Two circuits and courts in four states, in contrast, have held that such clauses also incorporate state arbitration rules, even where those rules limit or prevent arbitration. *See* Pet. 12-16.

Nothing in Respondent's brief diminishes the breadth or seriousness of this split of authority. Respondent concedes, as it must, that "[f]ederal and state courts have reached varying conclusions in interpreting choice-of-law clauses and determining whether they incorporate state rules of arbitration." Opp. 17 (emphasis removed). Unable to deny the existence of a conflict, Respondent argues that these divergent outcomes can be explained by "the courts' differing conclusions about the parties' contractual intent, viewed in light of the various state arbitration rules at issue." Opp. 20.

But the Petition itself refutes this argument: as is explained there, the question presented in this case *only* arises when the parties to a contract have *not* made a specific choice about the rules they want to govern arbitration, but rather have simply designated a given state's law to apply to the contract generally. *See* Pet. 15-16. The Petition concretely demonstrates that the generic choice-of-law clauses at issue in these cases are materially identical, *see* Pet. 16 n.1, and that no specific intent regarding arbitration procedures can be determined by parsing their words. The cases therefore cannot be distinguished based on differences in the parties' expressed intent. Nor can the cases be reconciled based on differences in state arbitration law: while the specific state rules at issue in the cases are different, they *all* involve procedures that limit or block arbitration or the applicability of the FAA, thereby implicating the FAA's pro-arbitration policies.

The cases on either side of the split of authority thus address and resolve differently a *common* question: whether, in light of the FAA, a generic choice-of-law clause incorporates state laws that, whatever their specific provisions, hinder or block arbitration. Tellingly, while Respondent implies that

the conflicting cases can be reconciled based on different "context[s]," "type[s] of state rule[s]," and "controlling state law principles," Opp. 23, it makes *no* effort actually to show how the cases can be distinguished or the division of authority resolved in this manner. And for good reason: the cases cannot be distinguished, and the split is real. These courts fundamentally disagree about the effect of the FAA on materially identical choice-of-law provisions in situations where state law would limit or block arbitration.[1]

B. This Case Presents An Ideal Vehicle For Resolving This Conflict Of Authority

The opinion below represents an exceptionally good vehicle for resolving this conflict. The Court of Appeal's decision squarely raises the question presented in this case, clearly holding, in line with other courts on its side of the conflict, that a generic choice-of-law clause *does* incorporate state procedures that hinder or prevent arbitration. The Court of Appeal's decision, moreover, implicates the FAA's pro-arbitration policies particularly sharply, because in applying those state procedures, it did not simply delay or narrow the scope of arbitration, but rather refused to enforce the parties' arbitration agreement altogether. Further, there is no

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[1] Contrary to Respondent's assertion, the Petition is not "premised" on a conflict over California law. *See* Opp. 18-19. While the Ninth Circuit in *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998), and the Second Circuit in *Hartford* did reach conflicting decisions about whether a generic California choice-of-law clause incorporates Section 1281.2, those decisions are merely instances of the broader conflict—involving at least 18 different jurisdictions—described in the Petition. Moreover, it is not at all clear that the California Supreme Court "resolved the 'conflict' between *Wolsey* and *Security Ins. Co.*," Opp. 19, as the court in *Wolsey* reached its decision based on application of the *federal* interpretive principles set forth in *Mastrobuono*. *Cf. Hartford*, 360 F.3d at 327 n.4 (In *Wolsey*, "the Ninth Circuit relied on its interpretation of *Mastrobuono* to conclude that the choice-of-law provisions did not incorporate section 1281.2(c)(4)," rather than "predict[ing] how the California Supreme Court would rule on the question of state law.").

serious dispute that the parties to the contract in this case expressed *no* specific intent regarding the procedures that were to apply to arbitration, but rather simply included a generic California choice-of-law clause in their contract. *See* App. 13a ("The [arbitration] clause remains silent about the procedural rules that the court should apply in determining the availability of arbitration.").[2] This case thus cleanly presents the question whether, consistent with the FAA, a generic choice-of-law clause can incorporate state law that blocks enforcement of a binding arbitration agreement.

1. Respondent argues that the decision below is not suitable for review by this Court because, as an "interpretation of a contract under state law," it presents no federal question. Opp. 9-10. That is plainly wrong: as Respondent itself recognizes later in its brief, a state court decision under state law does raise a federal question when, as here, it implicates the FAA's pro-arbitration policies. *See* Opp. 17-18. Indeed, in *Volt* itself, this Court reviewed a state court deci-

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[2] Respondent repeatedly insists that the Court of Appeal found that "the parties *intended* to incorporate California Code of Civil Procedure § 1281.2(c)." Opp. 1 (emphasis added); *see* Opp. 2 n.2, 8, 14, 23. That misreads the opinion. The Court of Appeal did conclude, as Respondent notes, that "any consideration of the contract as a whole, results in an interpretation that the parties expressly intended California law to apply and there is no provision that expressly or even implicitly states that the FAA's procedural rules of arbitration apply." App. 13a-14a. But that sentence simply highlights the obvious fact that the parties included an express California choice-of-law clause in their contract, providing that California law would apply *generally* to the contract. As noted, the Court of Appeal recognized that the contract was "silent" about what arbitration procedures were to apply. Thus, the Court of Appeal was left to apply the interpretive presumption set forth by the California Supreme Court in *Cronus Investments, Inc. v. Concierge Services*, 107 P.3d 217 (Cal. 2005), which (in the Court of Appeal's view) requires application of the California rules of arbitration absent an "express[] designat[ion] that the FAA procedural rules should govern the enforcement of the arbitration clause." App. 11a; *see also* App. 15a-16a; 21a-22a; 26a; 28a (reiterating *Cronus* presumption).

sion applying state law and finding that a generic choice-of-law provision incorporated California arbitration procedures. As Respondent concedes, this case and *Volt* are procedurally identical. *See* Opp. 3. And in *Volt*, there was no question that this Court could review the state court's application of state contract law for consistency with the FAA. *See Volt*, 489 U.S. at 474-79. This Court similarly reviewed a state court's application of state arbitration law in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

Here, the Court of Appeal held that, under the California Supreme Court's decision in *Cronus*, a generic California choice-of-law clause presumptively requires application of California arbitration rules absent an *express* selection of the FAA's procedural rules. That decision squarely raises the federal question identified by Petitioner: whether the Court of Appeal's application of this state law presumption conflicts with the pro-arbitration policies of the FAA, as expressed in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), and *Mastrobuono*.

Implicitly conceding the existence of a federal question, Respondent falls back on a merits argument, asserting that the question presented does not warrant review because the Court already decided in *Volt* that interpreting a generic choice-of-law clause to incorporate Section 1281.2(c) "does not offend the rule of liberal construction set forth in *Moses H. Cone*." Opp. 18 (quoting *Volt*, 489 U.S. at 476). Not so. *Volt*'s holding does not apply here because, unlike in *Volt*, the Court of Appeal refused to enforce the arbitration agreement under Section 1281.2(c)(1), rather than merely staying it under Section 1281.2(c)(4). *See* App. 43a; *cf. Doctor's Associates*, 517 U.S. at 688 ("The state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself."). Thus, contrary to Respondent's claim, *Volt* did not answer the specific question presented by this case.

Moreover—and more fundamentally—it is precisely the scope and continuing viability of *Volt* that is at issue in this case. *See* Pet. 4, 21. As discussed in the Petition, *Mastrobuono* appeared to cast doubt on *Volt*, suggesting that it is simply inconsistent with the FAA to interpret a generic choice-of-law clause as requiring application of state rules that thwart or limit arbitration. And in the wake of *Mastrobuono*, state and federal courts have struggled to reconcile the two cases, reaching the divergent outcomes described in the Petition. *Cf.* Opp. 23-24 (recognizing that some courts have read *Mastrobuono* to adopt a federal rule providing that generic choice-of-law clauses are insufficient to incorporate state rules limiting arbitration). Thus, even if *Volt* at one time answered the question presented in this case, that answer is now in doubt, and is the subject of an entrenched split of authority. It is therefore manifestly appropriate for this Court to revisit that question and resolve this confusion.

2. Respondent also argues that the question presented was not raised below. This argument is squarely refuted by the California Court of Appeal's opinion itself, which expressly notes that Petitioner argued that "ambiguities must be construed in favor of applying the FAA." App. 16a n.9. That alone is sufficient to rebut Respondent's claim.

Respondent further suggests, incorrectly, that Petitioner's briefing in this case was restricted to the question of the parties' intent under state law. *See* Opp. 8-10. In fact, while Petitioner did argue emphatically that a correct interpretation of the contract would have recognized that the parties specified that California procedures would *not* apply, its briefing was not limited to that issue. Petitioner's opening brief included an entire section arguing that the FAA "required the trial court to compel arbitration." Hynix Opening Br. at 32. Quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), Petitioner noted that "[t]he FAA 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to ar-

bitrate[,]' . . . a concern which 'requires that we rigorously enforce agreements to arbitrate.'"[3] Hynix Opening Br. at 33 (quoting *Mitsubishi*, 473 U.S. at 625-26). Petitioner also noted that "[t]his law is equally applicable in state as well as federal courts." *Id.* (quoting *Southland*, 465 U.S. at 12).

In its reply brief, Petitioner included a section arguing that "any ambiguities" in the arbitration agreement had to be "construed in favor of arbitration." Hynix Reply Br. at 14. This section expressly noted that there was a "presumption in federal and California law" that "uniformly favors sending disputes to arbitration," and cited (among other cases) *Moses Cone*, noting that that case had held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Hynix Reply Br. at 15 (quoting *Moses Cone*, 460 U.S. 1, 24-25 (1983)). Accordingly, the Court of Appeal was well aware of the applicability of the FAA to the contract, and of the FAA's requirement that court interpret arbitration agreements in favor of arbitration.[4]

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[3] Thus, contrary to Respondent's claims, the FAA does not contain exceptions to enforcement if arbitration would be "inefficien[t] or "risk inconsistent results." Opp. 15. Rather, as Petitioner explained to the Court of Appeal, the FAA requires that an arbitration agreement be enforced regardless of whether there are multiple parties involved, some of whom are not bound to arbitrate. *See* Hynix Opening Br. at 33-34 (citing *Moses Cone*, 460 U.S. at 19-20 ("federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement")).

[4] Contrary to Respondent's claims, the fact that the Court of Appeal's decision was unpublished does not counsel against review. *See* Opp. 2, 11 n.6. This Court routinely grants review of unpublished dispositions. As noted in the Petition, *Volt* involved review of an unpublished disposition from the California Court of Appeal. *See* Pet. 22. Many recent grants of certiorari similarly involve review of unpublished state court dispositions. *See, e.g.*, *People v. Cunningham*, No. A103501, 2005 WL 880983 (Cal. Ct. App. Apr. 18, 2005) *cert. granted, Cunningham v. California*, 546 U.S. 1169 (Feb. 21, 2006) (No. 05-6551); *People v. Sampson*, No. A102394, 2004 WL 2307111 (Cal. Ct. App. Oct. 14, 2004) *cert. granted, Samson v. California*, 545 U.S. 1165 (Sep. 27, 2005) (No. 04-9728); *People v. Hudson*, No. 246403, 2004 WL 1366947

3. Finally, Respondent argues that the decision below is consistent with both *Volt* and *Mastrobuono*, and therefore does not implicate the tension between these cases. Opp. 11-17. This is essentially a merits argument. It will doubtless be briefed and argued if this Court grants certiorari; but the fact that Respondent (predictably) believes that the decision below is correct and consistent with this Court's precedent is hardly a reason to deny review.

In any event, this argument is incorrect. The Court of Appeal's analysis clearly conflicts with the analysis in *Mastrobuono*. In that case, this Court recognized that a generic choice-of-law clause can reasonably be read as "merely a substitute for the conflict-of-law analysis" that would otherwise determine the governing substantive law, and thus that, "[a]t most," such a clause creates an "ambiguity" regarding the applicability of state rules limiting arbitration. *Mastrobuono*, 514 U.S. at 59. Under the "federal policy favoring arbitration," the Court held that this ambiguity had to be resolved in favor of arbitration. *Id.* Applying this logic here would plainly lead to the conclusion that the generic California choice-of-law clause at best introduced an ambiguity regarding whether California arbitration procedures would apply, and therefore that the FAA applies.

Respondent nevertheless argues that the Court of Appeal's decision is consistent with *Mastrobuono* because *Volt*, rather than *Mastrobuono*, controls decisions arising in state courts. Opp. 16. In this case, Respondent continues, the Court of Appeal decided that the parties' agreement was unambiguous; under *Volt*, it must therefore be enforced. Opp. 16-17. Initially, the assertion that "different approaches" apply "depending on whether the issue arises in state or federal court," Opp. 16, appears to conflict with this Court's recognition that the FAA was enacted in part to ensure uni-

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(Mich. Ct. App. Jun. 17, 2004) *cert. granted, Hudson v. Michigan*, 545 U.S. 1138 (Jun. 27, 2005) (No. 04-1360).

form enforcement of arbitration agreements in federal *and* state court alike. *See Southland*, 465 U.S. at 15; *Allied-Bruce*, 513 U.S. at 265. Further, holding that a state court's determination of the parties' intent is *immune* from review by this Court would allow parties' federal rights to be compromised by manipulation of state law, *see Volt*, 489 U.S. at 484 (Brennan, J., dissenting)—and in the end, Respondent itself recognizes that a federal court can review even a state court's holding that a contract is *un*ambiguous, *see* Opp. 18; *cf. Volt*, 489 U.S. at 475-76 (reviewing a state court determination for consistency with the FAA's pro-arbitration interpretive principle).

But in any event, the Court of Appeal's opinion in this case does *not* in fact fall clearly on the *Volt* side of the line this Court has drawn between *Mastrobuono* and *Volt*. In attempting to reconcile the two cases, this Court has suggested that *Volt* can be limited to situations where a state court has interpreted the contract at issue under state law; and where the state rule at issue re-orders the proceedings, rather than altering the enforceability of an arbitration agreement. Here, however, although the Court of Appeal did interpret the contract, it did *not*—as discussed above—find that the parties had expressly chosen California arbitration rules, but rather reached that conclusion by concluding that they had *not* expressly chosen the FAA, and then applying a default presumption based on *Cronus*. *See supra* note 2. There was thus no specific state court determination of contractual *intent* with respect to arbitration procedures. And even more clearly, the state rules at issue here resulted in a failure to enforce an arbitration agreement, not merely a re-ordering of proceedings. Thus, this case falls outside the distinctions this Court has drawn between *Volt* and *Mastrobuono*, and therefore raises particular sharply the question of how, if it all, the two cases can be reconciled.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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